FILED
MAY 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-6551

In The Supreme Court of the United States

JOHN CUNNINGHAM,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District, Division Five

JOINT APPENDIX

PETER GOLD
Counsel of Record for Petitioner
2269 Chestnut St., #124
San Francisco, CA 94123
(510) 872-6305
(520) 842-6305 (fax)

JEFFREY M. LAURENCE
Counsel of Record for Respondent
Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
(415) 703-5897
(415) 703-1234 (fax)

Petition For Certiorari Filed September 17, 2005
Certiorari Granted February 21, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment filed in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (Mar. 14, 2001) 2

Jury's verdict in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (May 30, 2003) 4

Reporter's Transcript of the sentencing proceeding in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0 (Aug. 1, 2003) 5

Unpublished decision of the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501 (Apr. 18, 2005) 27

Order modifying opinion and denying rehearing by the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501 (May 4, 2005) 51

Order denying discretionary review by the Supreme Court of California in *People v. John Cunningham*, No. S133971 (Jun. 29, 2005) 52

Order granting petition for writ of certiorari and motion for leave to proceed in *forma pauperis* by the United States Supreme Court (Feb. 21, 2006) 53

RELEVANT DOCKET ENTRIES

Date	Description
03/14/01	Indictment filed in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
05/30/03	Jury's verdict in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
08/01/03	Reporter's Transcript of sentencing proceeding in *People v. John E. Cunningham*, Superior Court of the State of California for the County of Contra Costa, No. 010396-0
04/18/05	Unpublished decision of the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501
05/04/05	Order modifying opinion and denying rehearing by the Court of Appeal of the State of California, First Appellate District, Division Five in *People v. John Cunningham*, No. A103501
06/29/05	Order denying discretionary review by the Supreme Court of California in *People v. John Cunningham*, No. S133971

GARY T. YANCEY, District Attorney
Contra Costa County
John C. Cope, BAR No. 154780
Deputy District Attorney
Courthouse, Fourth Floor
725 Court Street, P. O. Box 670
Martinez, California 94553-0150
Telephone: (925) 646-4500

Attorneys for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHN E. CUNNINGHAM, DEFENDANT. /	NO. 010396-0 DA NO. X 01 000007-5 INDICTMENT 01) PC 288.5

(Filed Mar. 14, 2001)

The Grand Jury of the County of Contra Costa hereby accuses JOHN E. CUNNINGHAM, Defendant, of the crime of felony, a violation of PENAL CODE SECTION 288.5 (CONTINUOUS SEXUAL ABUSE), committed as follows:

On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in

duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child.

GARY T. YANCEY
District Attorney

/s/ John C. Cope
JOHN C. COPE
Deputy District Attorney

Dated: 3-14-01
at Martinez, California.

* * *

A TRUE BILL

Dated: 3/14/01
at Martinez, California.

/s/ Owen Long
Foreman the Grand Jury of the County of Contra Costa, State of California

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA vs. JOHN E. CUNNINGHAM, Defendant	Department: 35 Docket #:010396-0 VERDICT OF THE JURY

(Filed May 30, 2003)

WE, THE JURY IN THIS CASE, FIND THE DEFENDANT, JOHN E. CUNNINGHAM, GUILTY
NOT GUILTY/GUILTY
OF A VIOLATION OF PC SEC. 288.5, (CONTINUOUS SEXUAL ABUSE), A FELONY AS SET FORTH IN THE INDICTMENT.

DATED: May 30, 2003 [Signature Redacted]
FOREPERSON

VERDICT OF THE JURY

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

HONORABLE **THERESA J. CANEPA**,
JUDGE, PRESIDING

---oOo---

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

vs. No. 010396-0

JOHN EDWARD CUNNINGHAM, JR.

Defendant. /

REPORTER'S TRANSCRIPT

DEPARTMENT 35

AUGUST 1, 2003

A.F. BRAY COURTS BUILDING, ROOM 2003

1020 WARD STREET, MARTINEZ, CA.

APPEARANCES

For the People:

ROBERT J. KOCHLY, DISTRICT ATTORNEY

BY: **JOHN C. COPE, ESQ.**

Deputy District Attorney

Contra Costa County

[712] For the Defendant:

LAW OFFICES OF LAWRENCE S. WARD

BY: **LAWRENCE S. WARD, ESQ.**

Attorney at Law

490 7th Street

Oakland, CA 94607

Reported By: RICHARD V. LUNA

CSR NO. 1850

[713] FRIDAY, AUGUST 1, 2003 9:40 A.M.

---o0o---

THE COURT: This is in the matter of People versus John Cunningham.

Appearances, please, Counsel.

MR. COPE: John Cope for the People.

MR. WARD: Larry Ward representing Mr. Cunningham, Your Honor.

THE COURT: All right. And, Mr. Ward, do you waive arraignment for judgment and sentence?

MR. WARD: So waived.

THE COURT: The record will reflect the probation report was timely provided to counsel and you have had it more than the required nine day period; is that correct?

MR. WARD: Yes, Your Honor.

THE COURT: Mr. Cope?

MR. COPE: Yes.

THE COURT: The record should reflect that I have read, received, and considered the Probation Officer's report consisting of 15 pages and that I have further read, received and considered the attachments to the report, letters from the community in mitigation, defendant's sentencing memorandum in mitigation, prosecution's sentencing memorandum in aggravation, the evaluations conducted by Doctors Lundeen and Kincaid, and the letters from the minor victim and his mother.

The defendant has been convicted by jury of violation of 288.5. It appears to the Court that by reason of the provisions of Penal Code Section 1203.066(a)(8), that the [714] defendant is not eligible for probation unless the Court finds to be true all five of the criteria set out in section 1203.066(c).

Counsel, do you agree with that?

MR. COPE: Yes.

MR. WARD: I believe he's eligible for probation notwithstanding the 1203.066 provision because the substantial contacts portion was stricken, and we have then the lewd and lascivious conduct portion of the 288.5. I think that makes him statutorily eligible for probation regardless of the 1203.066.

THE COURT: What is your response to that, Mr. Cope?

MR. COPE: He might make a good point. I'd ask the Court to consider for purposes of this hearing that he is eligible, although I certainly have arguments contrary.

THE COURT: Okay. So, for purposes of this hearing the Court will consider Mr. Ward's argument that

the defendant is eligible for probation based upon the striking of the substantial contacts language, correct?

MR. WARD: True.

THE COURT: All right. At this time, Counsel, would you like to argue or present testimony of some kind or speeches of some kind?

MR. WARD: Yes. I think it's more in the way of a presentation, Your Honor. I don't want to call it an argument.

THE COURT: All right.

MR. WARD: Obviously we are trying to persuade the Court to grant probation, or in the alternative a minimal [715] sentence on this matter.

The Court knows, having sat through the trial, this is a very delicate matter, and even the nature of the charge makes it a very, very delicate matter. I just want to mention as far as the probation report is concerned that the Court saw in my sentencing memorandum the scenario, and I believe it was Ms. Osbourne wrote the report and in contact with me and appeared to be cooperative. Just with Dr. Kincaid's report, I could not get it to her.

I take it the Court having read that would take it in light or supplement to the probation report?

THE COURT: Yes. That's correct.

MR. WARD: And I am going to ask a few people to speak on Mr. Cunningham's behalf.

But before I get to that, I would just like to make comment on the probation report as far as it relates to the

investigation, starting with page 1 of the probation report it's entitled "Investigation."

It appears the probation officer went through a summary, appears maybe police reports and summary of the testimony and she lists by way of investigation a number of acts that are allegedly committed, which I agreed were testified to during the trial.

But when the – I don't know if – I shouldn't say I don't know. My point is that the matter was submitted to the jury for three or more acts of lewd and lascivious conducts and other elements of the 288.5 and the jury came back with a finding of guilty.

[716] But the jury did not make a finding of, you know other than what was related to us as attorneys and the Court, that there were three or more lascivious acts, but not specifically what those acts were.

I'm just questioning the investigation report. It appears that it is saying well, it's true that all of this happened, and I'm just calling the Court's attention to that and that may not necessarily be true as far as the probation report.

Also, under "Evaluation" on page 9, starting with page 9, and I believe about line 17 – and I'm just paraphrasing – I am concerned that the report penalizes John Cunningham because of his consistent denial and setting forth that that allegedly shows a lack of remorse.

I addressed that in my sentencing memorandum as a matter of law under the case of ***People versus Coleman***, 71 Cal.App.2d 1159 and other cases.

As the Court has said, maybe I'm somewhat giving my argument now and then asking for people to be called.

THE COURT: Which is the way I would like to do it.

Would you rather have them speak first and then –

MR. WARD: Why don't we go ahead and have them speak now. I tried to get a list of, list of persons who wished to speak.

I guess well [sic] start with Mr. Stuart Welch. Take the podium and give your name to the Judge and any other information she would like, and what you would like to say.

MR. WELCH: Stuart. S-t-u-a-r-t. Welch. W-e-l-c-h.

[717] THE COURT: Go ahead, Mr. Welch.

MR. WELCH: I would just like to speak for Mr. Cunningham. I've known him going on close to 13 years. We were both police officers together while he was in Richmond, I was in the city of Pittsburg.

And since the accusations came forth he's also worked for me in private security. I've known him closely for a number of years, and all the time that we have spent together, whether that was taking trips, business meetings, conferences, or whatever, I've always known him to be an excellent father with his children. Never seen any improprieties at all.

I, myself, have three children, and he spent considerable amounts of time with them. I have seen him mingle so to say with other people's children, whether at church

or in a social function, and I have never seen nor heard anything improper.

And I believe that the amount of time that we have spent together, that I would have either seen, heard or thought of something in that regards. Same amount of training that was brought out in the trial with Mr. Cunningham's background and experience I would think myself, as an experienced investigator, police officer for a number of years, that I would have picked up on something, and I never seen that and I never observed any kind of conduct like that.

And I would just like to say that I could talk forever, but I don't want to hold the Court's time and other people together. I just known him for years as an upright man, true and to his word and all those thing. I have never seen [718] or heard anything.

THE COURT: Thank you, Mr. Welch.

MR. WARD: Your Honor, there are a total of four persons.

THE COURT: All right.

MR. WARD: Next would be Marcus Ashley.

Mr. Ashley, give your name to the Court and what you are presently doing as far as school or occupation.

MR. ASHLEY: My name is Marcus Ashley. I'm currently a student at the University of California, Berkeley.

I'd like to pretty much speak on John's behalf and say that the things that he been accused of, in all my time dealing with him and being involved and having him

involved in my life, never seen this type of character and I don't believe it to be true.

You know, he deals with kids such as myself, because my life hasn't always been what it is now. I have been a troubled young teen before in my lifetime and be in a group home for two years and still made it to where I am. But I grant that mostly to him and say his involvement in my life made a big difference.

And I just, you know, I just find the things that he has been accused of to be something that is no evidence in his character, and he pretty much deals with kids like myself on a daily basis and he has only a positive impact on their lives.

I wouldn't say anything other than that.

THE COURT: Thank you, Mr. Ashley.

MR. WARD: Next, Laquita McCoy.

[719] Ms. McCoy, state your name for the record and what capacity, like work, what you do.

MS. McCOY: My name is Laquita McCoy. I work in accounts payable.

I have been knowing John Cunningham for a while now. We spent a lot of time together, go to church and go out, and kids intermingle with each other quite a bit. Again I have never seen any type of anything to even insinuating something like this could have occurred.

For the most part I just want to say he is a wonderful father, wonderful person, and definitely a God fearing man, and I just believe that this couldn't have happened.

All I can say, he's really a good person and good disciplinary person, and he's wonderful uplifting person to have in your life.

THE COURT: Thank you, Mr. [sic] McCoy.

MR. WARD: The last speaker, Your Honor, would be Pastor Scott.

Would you give your name to the Court, state your name and capacity.

PASTOR SCOTT: My name is Melvin Scott, Pastor Melvin Scott.

I have been knowing John Cunningham for countless number of years. He has traveled with me. He was my arm bearer, adjutant to me in New York, Philadelphia, Texas. Wherever we go he would accompany me.

Very mannerable conduct, excellent. Every church we [720] went to or state function, people loved him. I have licensed him as a minister, ordained him as elder in the church. His conduct at my church, they all love him. Children love him.

We have had, also had opportunity of living across from each other, about four, five years in the same complex. Children would always be at John's house. That was the hangout. They all showed love and respect to him, and I find him – I don't want to sound redundant in the same thing. We all believe that these accusations against him are not true, but yet the King's heart's in God's hands and God will prevail.

I want to say to you that we all love John and know John, being myself, being very mannerable, very respectful, excellent teacher and speaker at the church and different places we go. So, we just try and believe God for the best for him, because he is a beautiful young man. Thank you.

THE COURT: Thank you.

MR. WARD: Your Honor, that would be all the speakers, presentation as far as persons speaking on John's behalf.

Just for the record, there are approximately 20 people here who are in support of John and I've talked to several of them and they would, if called to say something they would say, it would be consistent with what has just been said to the Court.

I am again mindful that the Court does have my sentencing memo, therefore, I am not going to belabor. But, of course, as the Court knows – and this is a very important time to John Cunningham. And the character letters speak to that.

[721] Doctor Kincaid's report sets forth although he denies the allegation, there are certain other aspects though that can be worked on as far as treatment is concerned and that he would be amenable to treatment. I believe Dr. Kincaid stated in his report one does not have to admit to be amenable to treat one.

With – I think it's Dr. Lundeen's report, this is the report that was submitted pursuant to the 288.1 request by the Court. And even Dr. Lundeen sets forth that he is not a danger, does not appear that he is a danger to the

community. And that is consistent with Dr. Kincaid's report.

Doctor Lundeen does allude to the fact that since he is in denial his treatment is of no help to him. And plain reading of the language is, in Dr. Lundeen's report, it appears that treatment would not be if he is in denial. But Dr. Kincaid sets forth he can benefit by treatment.

In summary, there is something, I always say to myself. There's nothing more tedious than an accounting of the obvious. And the obvious position of defense counsel would be that here we have had a man who but for this conviction – and I can't belittle this conviction – has led an admirable life. One that his mother has been proud of, the family, colleagues, associates have been proud of.

Punishment is an aspect of our current law, I guess the major, main premise, whereas in past time rehabilitation. Looking at the punishment aspect we have a man here who has now been incarcerated now for about 60 days – 64 days he tells me. And I do believe he's an appropriate candidate for probation.

288.5 is a terrible conviction. But when we look at [722] punishment, yes, let us punish. I think he has been so punished now by having to have people who love him, people who care for him have to see him in this position, that a grant of probation would not be out of the question.

I believe there are factors in mitigation as set forth – if we look at Dr. Kincaid's report, he is amenable to treatment. If we look at Dr. Lundeen's report, he is amenable to treatment.

So, in summary we are asking the Court to look at punishment, but also look at is there a great probability of

rehabilitation as far as Mr. Cunningham is concerned? He has the support of his family, support of the community and those members who have come here and I believe that if given the opportunity he would restore his credibility and be a citizen that everyone could be proud of henceforth.

I'm aware of John Doe. You know, I sat here through the testimony, I sat here through the trial. And obviously the jury believed – it was a credibility issue and the jury believed John Doe.

But in Mr. Cope's sentencing memo he alludes to the fact that the child was vulnerable; that my client was in a position of trust or care as a parent. I think those are all included elements though in 288.5.

And obviously I'm addressing any factors in aggravation that the legislative intent in setting forth the elements was to take those into consideration. So, the Court obviously, in my opinion, also should not aggravate because of those if the Court finds those to be true.

[723] So, in summary I'm asking the Court to in essence, if there's punishment, yes, punish. But he's been punished greatly so far. But look at the rehabilitative aspect of this and consider probation.

THE COURT: Thank you, Mr. Ward.

Mr. Cope.

MR. COPE: Thank you. And I won't take too long and I won't repeat – I'll attempt not to repeat what I have already written to the Court in my memorandum.

I would like to point out that there are people here that have their beliefs and are on Mr. Cunningham's side and always will be. And I could – obviously you received letters from the victim and his mother, and there are people on the other side who could come before the Court.

But really the only opinions that matter, I believe, is the collective opinion of 12 impartial people. This is past the point of accusation. This is past the point of possibly this happened to this young man. This has been proven. Defendant's been convicted.

And anyone, certainly anyone who's impartial who sat in this courtroom and listened to the testimony would have no doubt as to that. Anyone, especially anyone impartial who listened to Mr. Cunningham's testimony would know without any doubt that he lied. He lied to the Court, he lied to the police, he lied to the jury. I have no doubt he's lied to his lawyer, lied to his family. That he's lied to the DA investigator and he lied to these two doctors that came and interviewed him.

[724] Now, I'm not asking the Court to punish for that lying. I'm only asking the Court to recognize that he's lied, and how can an opinion from a doctor based on those lies, amenable to treatment, be reliable? It's only as reliable as the information that the doctors got, and that is not reliable.

And there can – this is not just beyond a reasonable doubt. Anyone who sat in this courtroom would know that unfortunately – and I wish it weren't true, I wish none of this happened to John Doe, but it's undeniable.

Factors in aggravation and factors in mitigation are factors the Court should consider in granting probation.

Under the rules of Court it requires a qualitative analysis as well as a quantitative analysis.

If there are some factors in aggravation, the Court doesn't say there are three aggravation, three in mitigation, therefore, I am going to give the mitigated term. The Court can assign whatever weight it believes necessary to whatever factors in aggravation or factors in mitigation that the Court believes is appropriate.

In this case there are numerous factors in aggravation and I cited them in my points, I believe those factors in aggravation, the weight of them is so great in this case that it mandates a maximum sentence.

Part of the purpose of the Court's sentencing is to send a message to the defendant by way of punishment. It's also to send to message to society by way of deterrent, and I believe inherent in those the responsibility of the Court is to send a message to society about what the defendant did and how [725] serious our society takes that crime.

I think its important that we send the defendant a message that he committed the most despicable crime possible by a father. This crime of 288.5 could be perpetrated by a relative or friend who has recurrent access to a victim by simply touching a child in a sexual manner over the clothing. That would be the kind of minimum type of offense that could be done three times and qualify under this Penal Code Section.

Counsel suggested that we should for purposes of sentencing assume the minimum happened in this case, because we don't really know what the jury found other than that he was guilty of this charged crime. I don't think that is accurate. The Court heard the testimony. The only

types of activity that the jury could have based its conviction on were horrendous acts and numerous.

Even counsel in closing argument argued if you belief [sic] John Doe, if you find – in order to find defendant guilty you have to believe this happened hundreds of time. Well, they came back and said yes, that is what we believe, hundreds of times.

What types of acts are we talking about? I don't even want to say it in court. The Court knows what I am talking about. We are talking about horrendous things, not simple touchings. Penetration in the worse possible way, in the most despicable manners, and by someone who ought to be trusted, by the boy's own father.

It's impossible to imagine a situation in which this crime could be committed in any more aggravating way than the [726] way it was done in this case. I ask the Court to send a message in this Court's sentence to the defendant, to his family, to society, and probably most important to send a message to that little boy who is going to be a man. The message is good daddies don't do this, bad dads do this, and it's the worst possible thing that a dad could do, and, therefore, we are giving him the worst possible sentence. Thank you for your time.

MR. WARD: Your Honor, could I just say one more thing –

THE COURT: Yes.

MR. WARD: – and then submit it?

John Doe's mother in her letter to the Court sets forth – page 3 of her letter – "even though his father has been convicted, he doesn't want him to go to jail because he

loves him and doesn't want his father and brothers and sisters to be mad and hate him. He misses them."

I'm asking again the Court to consider probation and also what John Doe's wishes were.

THE COURT: All right. I understand that the victim is not present. I did receive a letter from him and from his mother.

So, other than that, is there any legal cause, Counsel, why judgment should not be pronounced?

MR. WARD: No, Your Honor.

THE COURT: Mr. Ward, do you waive formal arraignment for pronouncement of judgment?

MR. WARD: So waived.

[727] THE COURT: All right. Defendant has been convicted of a violation of Penal Code Section 288.5. The Court appointed Dr. Lundeen, a qualified clinical psychologist, to examine the defendant pursuant to Penal Code Section 288.1 and for him to include a consideration of the factors specified in sections 1203.066(c)(2), (3), and (5). The Court has read and considered such report.

The defendant was also examined by Dr. Kincaid, a clinical psychologist, at his own expense. The Court has read and considered such report.

Defendant has been convicted of a violation of Penal Code Section 288.5, and the allegation pursuant to section 1203.066(a)(8) having been found true, the Court does not find that all of the criteria set out in section 1203.066(c) are true.

The criteria are the following: One, whether the defendant is the victim's natural parent. That is true.

Two, whether a grant of probation to the defendant is in the best interest of the child. The Court finds that not to be true, and that is based on the fact that the child currently lives out of state with his natural mother and is not having contact with the defendant.

Number 3, whether rehabilitation of the defendant is feasible, and defendant is amenable to undergoing treatment. The Court finds that is not true. That is based primarily upon the reports submitted by Doctors Kincaid and Lundeen.

Four, whether the defendant is removed from the household of the victim until the Court determines that the [728] best interests of the victim would be served by returning the defendant to the household of the victim. The Court finds that is not true. While correct, the defendant is removed from the household of the victim, the Court does not believe there is any point at which point the defendant would be returned to the household of the victim.

And, No. 5, whether there is no threat of physical harm to the child victim if probation is granted. The Court finds that is not true, and that is based upon the nature of the threats posed by the defendant to the victim during the period of substantial sexual abuse.

Since all of the above factors are not true, probation is hereby denied.

As to the count charged in the Information, the sentencing range is six, twelve or sixteen years.

The Court has considered the mitigating factors relating to the crime as set out in Rule 4.423(a) and finds none.

The Court has considered and finds the following mitigating factory [sic] relating to the defendant as set out in Rule 4.423(b), and that is that the defendant has no prior record of criminal conduct.

The Court considers and finds the following aggravating facts relating to the crime as set out in Rule 4.421(a). The crime involved great violence, great bodily harm, the threat of great bodily harm and acts disclosing a high degree of viciousness and callousness; the victim was particularly vulnerable due to his age and his dependence upon [729] the defendant as his biological father and primary caretaker.

The defendant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statement about the crime, and the defendant took advantage of a position of trust or confidence to commit the offense in that he is the biological father of the victim and the sole caregiver of the victim for a substantial period of time.

The Court also considered and finds the following aggravating facts relating to the defendant as set out in Rule 4.421(b). Defendant has engaged in violent conduct which indicates a serious danger to society.

The Court has also considered other circumstances in aggravation as permitted by Rule 4.408. That is defendant had been a peace officer for many years at the time he committed these acts which violated his sworn duty to

serve the community of which his minor son was a member.

As both counsel knows, the Court heard all of the testimony and I found the testimony of the minor child to be credible and compelling. His testimony was consistent from his initial statement to the social workers, to the time that he testified in court. It was as dramatic as it was horrific.

I also heard and evaluated the testimony of the defendant. I found his testimony to be inherently incredible, inconsistent in the retelling, and most importantly shocking is his attempt to blame a minor child for the sexual acts which occurred.

As to the Count charged in the Indictment, the Court finds that the circumstances in aggravation outweigh the [730] circumstances in mitigation. Therefore, the Court is imposing the upper term of imprisonment. The base term for the charged count is 16 years.

I find that the following Rule 4.410 sentencing objectives are applicable: Protecting society, punishing the defendant, deterring others from criminal conduct by demonstrating its consequences, and preventing the defendant from committing new crimes by isolating him for the period of incarceration.

Mr. Cunningham, it is therefore the judgment and sentence of this Court that you shall be imprisoned in the state prison for 16 years.

As you have been convicted of a violation of Penal Code Section 288.5, you are therefore ordered to register pursuant to Penal Code Section 290(a)(1). You are ordered to provide two specimens of blood, a saliva sample, right

thumbprint and full palm, print impression of each hand for law enforcement analysis pursuant to Penal Code Section 296(a)(1). You will be included in the State's DNA and Forensic Identification Data Base and Data Bank Program.

As you have been found guilty of this violation and the victim was under 18 years of age, pursuant to Penal Code Section 1202.05 it's ordered that you have absolutely no visitation with the victim. The clerk is to give notice to the Department of Corrections, the victim's mother and the child victim.

Also, because you have been convicted of this violation you are ordered to submit to a blood or oral mucosal [731] transudate saliva test pursuant to Penal Code Section 1202.1.

You must also paid [sic] restitution costs to be determined pursuant to 1203.1g and 1202.4(a) for the medical and psychological expenses for the sexual assault on the minor.

The Court has determined the amount of the restitution fine pursuant to the formula set out in Penal Code Section 1202.4(b)(2), which is equivalent to $3,200. The Director of Corrections may Collect this restitution from the defendant's earnings in prison.

Pursuant to Penal Code Section 1202.45 the Court is imposing an additional parole revocation restitution fine in the same amount as that just imposed. The payment of this fine is suspended and remains suspended unless your parole is revoked.

The law permits an award of conduct and worktime credits up to one third of the sentence imposed by the Court. The calculation of credits will be determine [sic] by

the Department of Corrections. The presentence credits of 69 actual days have been determined by the Probation Department.

As the defendant has been convicted of a sex crime described in Penal Code Section 667.5(c,) then pursuant to Penal Code Section 3000(b)(1), the defendant will be on parole for a period not exceeding five years following release from prison. Any parole violation time, either because defendant has absconded or were [sic] in custody will not be counted toward the parole period.

Mr. Cunningham, you have the right to appeal from this sentence. If you wish to appeal you must file a written [732] notice of appeal with the clerk of this Court within 60 days from today. If you appeal and are unable to hire a lawyer, the Appellate Court will appoint a lawyer to represent you on appeal at no cost to you. You will also have a right to a free transcript and record of the necessary proceedings in this court. The written notice of appeal must be timely filed.

Do you have any questions about how you appeal?

MR. WARD: I don't believe he has, Your Honor.

We would like to file with the Court, if permitted, [sic] notice of appeal.

THE COURT: Yes, we will permit that.

According to the clerk it should go down to the clerk's office, Mr. Ward, and file that today.

MR. COPE: Your Honor, if I may interject. I believe there is a limit on the conduct credits in a case like

this to 15 percent. I think the Court said one-third. I think it's limited to 15 percent conduct credit, to make that clear.

THE COURT: Thank you, Mr. Cope.

At this time if your bail has not been exonerated it is now exonerated. You are remanded to the custody of the Sheriff of Contra Costa County. The sheriff is ordered to deliver you to the custody of the Director of Corrections of the Reception and Guidance Center at Chino, California.

All right. Thank you.

(Matter adjourned)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

2005 WL 880983

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)** (Filed Apr. 18, 2005)

John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.)[1] On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We reject these contentions and affirm.

BACKGROUND

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years

[1] Appellant was sentenced to 16 years in state prison.

of his life. In December 1999, when Doe was 10 years old, he went to live with appellant, appellant's girlfriend, Latasha, appellant's and Latasha's baby, and Latasha's young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys' Town and falsely reported that there was no food in his mother's house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is hu[m]ping me." Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to

what it meant. Doe told Karla about appellant's repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe's allegations, Gerrell talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, "In a week you better say you are lying or else I am going to fuck you up."

After Doe reported appellant's abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe testified that the examination revealed no trauma to Doe's anus, consistent with most postsodomy examinations. However, the doctor said that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O'Malley of the Children's Interview Center (CIC) conducted a videotaped sexual assault interview of Doe.[2] Doe's statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.[3] At the beginning of

---

[2] A videotape of the CIC interview was played for the jury and admitted into evidence.

[3] The videotaped interview was played for the jury.

the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

DISCUSSION

I. *Doe's Hearsay Statements Were Properly Admitted*

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in *Crawford v. Washington* (2004) 541 U.S. 36. Since Doe testified

at trial, no Confrontation Clause violation occurred. (*Crawford,* pp. 68-69.)

Section 1360[4] creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) In determining whether child hearsay statements possess the requisite indicia of reliability pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: "(1) spontaneity and consistent repetition; (2) the mental state

---

[4] Section 1360 provides, in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) For purposes of this section 'child abuse' means an act proscribed by Section . . . 288.5 of the Penal Code. . . ."

of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. [Citation.]" (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330, citing *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.) Although courts have considerable leeway in their consideration of appropriate factors, the "'unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.' [Citation.]" (*Roberto V.*, at p. 1374.)

Appellant relies on *Lilly v. Virginia* (1999) 527 U.S. 116 and *People v. Eccleston, supra,* 89 Cal.App.4th 436 to argue we are to exercise de novo review over the trial court's reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was *Ohio v. Roberts* (1980) 448 U.S. 56.[5] *Roberts* had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. (*Id.* at p. 66.) Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under *Roberts* that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding (*People v. Roberto V., supra,* 93 Cal.App.4th at p. 1367; *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1329-1330),

---

[5] During the pendency of this appeal, the United States Supreme Court rejected the *Roberts* analysis in *Crawford v. Washington, supra,* 541 U.S. 36.

the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause (*Lilly,* at pp. 136-137; *Eccleston,* at pp. 445-446). Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court's ruling based on the evidence before the court at the time of the ruling. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview.[6] The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report,[7] after which it ruled Doe's hearsay statements admissible.

---

[6] We note that appellant's objection failed to specify which adult relatives were referred to. However, the relatives were identified in the police reports and the CIC videotape the court considered in ruling on the motion.

[7] The police reports and transcript of the CIC interview were introduced solely for purposes of the section 1360 motion, and were not admitted into evidence.

A. *The Police Reports*

1. *Initial Report*

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant. He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations

were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. *Supplemental Report*

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting his dingling in [Doe's] butt," and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease "on his butt" before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. *The CIC Videotape*

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded "so [he] could talk to [her]" "about something that happened to [him]." In response to O'Malley's saying, "Well if you feel comfortable right now, [Doe], could you tell me what happened," Doe gave a

detailed description of the molestation he suffered for a year by a "person" or "him." Doe described appellant's use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who "him" referred to, Doe identified appellant. Doe said appellant "humped" him, which Doe said meant "molested." The conduct Doe described as appellant "humping" him constituted sodomy. Doe often referred to appellant's penis as his "private part," but also referred it [sic] as his "ding-a-ling" and his "dick." He referred to having to go to the bathroom after being sodomized as "when I boo-boo." He also said after being sodomized something "white with bubbles" would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first "whooped him" in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt "shock." Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he "got tired of him doing it" and "it was disgusting" and told his cousin Brittany to tell her mother. He said he was glad he "brought it out" because he "got sick of it." He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had "said some stuff" about his mother that was not true. When O'Malley asked how she would know if he was

telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. *Court's Reasoning Regarding Reliability*

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability: "In terms of reliability, the court finds that the spontaneity of the statements by the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. [¶] The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology . . . in which he described the acts is unexpected in a child of similar age. [¶] And to further explain the court's finding . . . the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. [¶] And fourth, the lack of motive to fabricate is demonstrated

by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. [¶] So, based upon those factors the court finds under *Brodit* and *Eccleston* and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to lie – he wanted to move back to Wanda's house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe's accusations.

We conclude the court did not abuse its discretion in finding Doe's hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O'Malley, Doe's statements were spontaneous in the sense that Doe initiated them. (See *People v. Eccleston, supra,* 89 Cal.App.4th at p. 446.) In addition, his statements to O'Malley regarding appellant's abuse were in response to her neutral question, "could you tell me what happened?" We reject appellant's assertion that Doe's

hearsay statements were not consistently repeated, but were "embellished" and "refined" with each retelling. Doe's initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O'Malley. Doe's statements to Karla and O'Malley were remarkably consistent as to the "general outline of abuse" (*id.* at p. 446), and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe's mental state, the record is mixed. Although he conceded to O'Malley that he had previously fabricated claims against his mother and stepfather, O'Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant's abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe's reliability.

We also reject appellant's assertion that Doe's statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe's extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe's level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant,

reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial. (See § 1360, subd. (a)(3)(A).)

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. *The Court Properly Imposed the Upper Term*

A. *Aggravating Factors*

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term.[8]

Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written

---

[8] The People assert that appellant has waived this claim because he only objected below to the aggravating factors that the victim was particularly vulnerable and that appellant took advantage of a position of trust. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) Even assuming the claim is waived, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

report and recommendation.[9] Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated "'either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate." Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid's report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw "little likelihood that [appellant's] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time." Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although "offense-specific treatments are almost nonexistent in custody."

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation (Cal. Rules of Court,[10] rule 4.421):(1) "The crime involved great sexual violence and callousness toward a 10-year-old child." In particular, the report noted that the victim was "brutally whipped and sodomized over

---

[9] Dr. Lundeen's report is not included within the appellate record but is summarized in the probation report.

[10] All rule references are to the California Rules of Court.

100 times in a one year period." (2) The victim was particularly vulnerable as he relied on his father, as his custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. *The Relationship Between Appellant and the Victim*

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott, supra,* 9 Cal.4th at p. 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on *Garcia,* which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra,* 166 Cal.App.3d at p. 1070.) We agree with this analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court

could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

2. *Danger to Society*

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community (rule 4.421(b)(1)), is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. *Great Violence and Great Bodily Harm*

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm (rule 4.421(a)(1)) and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime (rule 4.421(a)(6)). Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating

factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances. (*Ibid.*; accord, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043-1044.)

4. *Status As Peace Officer*

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a).[11] In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim "distinctively worse than it would ordinarily have been." (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *Brown,* where the defendant's status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown*

[11] Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

stated that the trial court could properly have considered the unusual facts relating to the defendant – that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*People v. Brown, supra,* 83 Cal.App.4th at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant's police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court's discretion.

B. *Blakely v. Washington*

In a supplemental brief filed pursuant to *Blakely v. Washington, supra,* 124 S.Ct. 2531, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process.[12] The People rejoin, in part, that appellant waived his challenge.[13]

---

[12] The issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of imposing an upper term sentence is currently pending in our Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677.)

[13] The California Supreme Court is currently considering the issue in *People v. Black,* review granted July 28, 2004, S126182.

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537.) As *Blakely* explained, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence – and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely,* at p. 2540.) Here, the 16-year upper term was the maximum

statutorily authorized sentence for violating Penal Code section 288.5. The court's imposition of that maximum did not violate appellant's rights to jury trial or due process.[14]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, J.

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado,* review granted January 19, 2005, S129826, California Rules of Court, rule 28.2(d)(2).

[14] After submission of this case, the United Supreme Court decided *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738] (maj. opn. of Stevens, J.).) *Booker,* in our view, clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit,* but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott, supra,* 9 Cal.4th at pp. 349-350.)

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

In this case, the trial court relied on a number of aggravating factors as the basis for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim's age, I believe that *Blakely* requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under *Blakely*. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

United States v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a

result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra,* 125 S.Ct. at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.[1]

Jones, P.J.

[1] Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term,* unless there are circumstances in aggravation or mitigation of the crime." (Italics added.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)** **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]** (Filed May 4, 2005)

THE COURT:

It is ordered that the opinion filed herein on April 18, 2005, be modified as follows:

At the end of the last paragraph on page 15, after the sentence ending "upper term was an abuse of the court's discretion," add the following sentence:

> Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know [sic] that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

Respondent's petition for rehearing is denied. Jones, P.J., would grant rehearing.

Dated: **May 4, 2005** **JONES, P.J.**

Court of Appeal, First Appellate District,
Division Five – No. A103501
S133971

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN CUNNINGHAM, Defendant and Appellant.

(Filed Jun. 29, 2005)

Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182), ___ Cal.4th ___, 2005 WL 1421815 <http://www.courtinfo.ca.gov/opinions/documents/S126182.PDF> regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law.

Brown, J., was absent and did not participate.

/s/ George
Chief Justice

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 21, 2006

Mr. Peter Gold
2269 Chestnut Street, #124
San Francisco, CA 94123

Re: John Cunningham
v. California
No. 05-6551

Dear Mr. Gold:

The Court today entered the following order in the above-entitled case:

The motion for petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk